

DECLARATION OF EMILY B. SUHR

I, Emily B. Suhr, declare as follows:

1. The facts set forth herein are based on my personal knowledge or, as specified, upon my information and belief, based on official acts and writings. If called upon as a witness, I could and would testify competently to the facts contained herein under oath.

2. I am an attorney at law, duly licensed to practice before this Court and all of the courts of the State of California, and an associate of the law firm of Lawrence Beach Allen & Choi, PC, attorneys of record for County of Los Angeles, Los Angeles County Sheriff's Department, Jim McDonnell, Christopher Bergner, Marcelo Quintero, and Michael Austin in this matter.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Court's November 2018 Order denying Plaintiff Cherie Townsend's petition to perpetuate testimony and *ex parte* application.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on December 4, 2018 at Glendale, California.

/s/ Emily B. Suhr
EMILY B. SUHR

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF A
PETITION BY CHERIE
TOWNSEND, AN INDIVIDUAL,
TO PERPETUATE TESTIMONY
UNDER FED. R. CIV. PROC. 27

Case No. 2:18-mc-00146-UA-JC

ORDER DENYING PETITION TO
PERPETUATE TESTIMONY,
DENYING EX PARTE
APPLICATION AS MOOT, AND
DISMISSING ACTION WITHOUT
PREJUDICE

I. SUMMARY

On October 31, 2018, petitioner Cherie Townsend filed a Verified Petition to Perpetuate Testimony (“Petition”) and an Ex Parte Application to Have Petition to Perpetuate Testimony Heard on Shortened Time (“Ex Parte Application”) with a supporting declaration of petitioner’s attorney Nazareth M. Haysbert (“Haysbert Declaration”). The Petition, which is predicated on Rule 27 of the Federal Rules of Civil Procedure, seeks an order authorizing petitioner to take the oral depositions of five individuals – Sheriff James McDonnell, Captain Christopher Bergner, Sergeant Marcelo Quintero, Sergeant Michael Austin, and Deputy District Attorney Patricia Wilkinson (collectively “Proposed Deponents”) – and to direct the Proposed Deponents to produce evidence at such depositions. (Petition

1 at 16). The Ex Parte Application requests that the Court hold a hearing on the
2 Petition no later than November 2, 2018.

3 The Court finds that a hearing on the Petition and the Ex Parte Application
4 are unnecessary and deems such matters submitted for decision. See Local Rule
5 7-15.

6 For the reasons set forth below, the Petition and the Ex Parte Application
7 are denied and this action is dismissed without prejudice.

8 **II. PERTINENT LAW**

9 Rule 27(a) permits the filing of a verified petition to request an order which
10 authorizes the petitioner to depose named persons to perpetuate testimony in
11 advance of possible future litigation in federal court. The petition must show the
12 following:

13 (A) that the petitioner expects to be a party to an action cognizable
14 in a United States court but cannot presently bring it or cause it to be
15 brought;

16 (B) the subject matter of the expected action and the petitioner's
17 interest;

18 (C) the facts that the petitioner wants to establish by the proposed
19 testimony and the reasons to perpetuate it;

20 (D) the names or a description of the persons whom the petitioner
21 expects to be adverse parties and their addresses, so far as known; and

22 (E) the name, address, and expected substance of the testimony of
23 each deponent.

24 Fed. R. Civ. P. 27(a)(1); see Martin v. Reynolds Metals Corp., 297 F.2d 49, 55
25 (9th Cir. 1961) (federal courts have power under Rule 27 to order deposition
26 where party seeking the deposition is unable to bring the suit or cause it to be
27 brought).

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At least 21 days before the date set for a hearing on a petition, the petitioner “must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing.” Fed. R. Civ. P. 27(a)(2). Service must be made in accordance with Rule 4 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 27(a)(2).¹

The Court must issue an order to preserve testimony if the petitioner adequately demonstrates “that perpetuating the testimony may prevent a failure or delay of justice.” Fed. R. Civ. P. 27(a)(3); see Tennison v. Henry, 203 F.R.D. 435, 440 (N.D. Cal. 2001) (“Courts have held that the requirements of Rule 27(a) have been met where an individual seeking discovery: 1) shows he is acting in ‘anticipation of litigation in federal court’; 2) ‘adequately explain[s]’ the substance of the testimony he seeks to obtain; and 3) presents evidence that there is a ‘significant risk’ that the evidence will be lost if it is not perpetuated.”) (citation omitted).

“The grant or denial of a petition to preserve testimony is within the discretion of the Court.” State of Nevada v. O’Leary, 151 F.R.D. 655, 657 (D. Nev. 1993) (citation omitted), aff’d, 63 F.3d 932 (9th Cir. 1995).

III. DISCUSSION

Here, the Petition is deficient for at least the following reasons:

First, the Petition fails to establish that petitioner cannot presently bring an action cognizable in a United States court. Petitioner represents that she intends to bring an action in this federal court pursuant to Title 42, United States Code, section 1983 (“Section 1983”) and to assert claims arising under the Fourth and Fourteenth Amendments to the United States Constitution and state law. She claims that she cannot file her Complaint now because she must await resolution of claims she filed on October 1, 2018 with multiple local government entities

¹If service under Rule 4 cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. Fed. R. Civ. P. 27(a)(2).

1 under the California Tort Claims Act (CTCA), California Government Code
2 §§ 900, et seq. The requirements of the CTCA do not control claims under federal
3 statutes such as Section 1983 and accordingly, the CTCA is no barrier to petitioner
4 presently bringing a Section 1983 action predicated on the Fourth and Fourteenth
5 Amendments. Butler v. Los Angeles County, 617 F. Supp. 2d 994, 1001 n.2 (C.D.
6 Cal. 2008) (citation omitted); Williams v. Horvath, 16 Cal. 3d 834, 842 (1976).
7 As plaintiff offers no reason why she cannot presently bring a Section 1983 action,
8 she is not entitled to relief under Fed. R. Civ. P. 27.

9 Second, petitioner fails to demonstrate that there is a need to perpetuate the
10 testimony and evidence in issue in this particular case. “Unlike other discovery
11 rules, Rule 27(a) allows a party to take depositions prior to litigation if it
12 demonstrates . . . the reasons the testimony will be lost if not preserved.” Calderon
13 v. United States District Court for the Northern District of California, 144 F.3d
14 618, 621 (9th Cir. 1998) (citation and internal quotation marks omitted). Factors
15 that courts have found to be persuasive in justifying the need to perpetuate
16 testimony are advanced age or infirmity of a witness, the possibility that the
17 witness will not be willing to testify if discovery is delayed, and the uniqueness of
18 the information at issue. Tennison v. Henry, 203 F.R.D. at 441 (citations omitted).

19 Here, petitioner relies on none of the foregoing bases, and instead
20 essentially asserts that it is “immediately necessary” to perpetuate the testimony
21 and evidence in issue because of (1) alleged conduct by the Sheriff’s
22 Department/members thereof, *i.e.*, framing petitioner for a murder even though
23 there is not enough evidence to charge her, defaming petitioner through various
24 public pronouncements; (2) the impending election which may result in Sheriff
25 McDonnell’s loss of his current position and the shifting of other key personnel
26 which in turn may make it more difficult for such individuals to produce evidence;
27 and (3) the need to ensure that the memories of the Proposed Deponents are fresh.
28 (Petition at 2, 6-8). As to the first proffered reason, the Court fails to comprehend

1 how the referenced alleged conduct of the Sheriff's Department/members thereof
2 establishes an immediate need to preserve the testimony/evidence of the Proposed
3 Deponents or in any way suggests that the testimony and evidence of the Proposed
4 Deponents would be lost if not preserved. As to the second proffered reason,
5 petitioner's speculation as to the outcome of the election and the potential impact
6 it may have on personnel and the ease of production of evidence likewise is
7 insufficient to demonstrate the requisite need or to establish a sufficient risk that
8 testimony and evidence would be lost if not preserved now. See Penn Mutual Life
9 Insurance, Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995) ("[A] general
10 allegation is not sufficient to satisfy Rule 27's requirement that a petitioner
11 demonstrate an immediate need to perpetuate testimony."); Petition of Rosario,
12 109 F.R.D. 368, 370-71 (D. Mass. 1986) (unsubstantiated claim of rapid turnover
13 of personnel insufficient to show that testimony in danger of being lost under Fed.
14 R. Civ. P. 27). As to the third proffered reason, petitioner offers no basis to
15 conclude that testimony and evidence would be lost due to a deterioration of the
16 Proposed Deponents' memories. See Penn Mutual Life Insurance Co., 68 F.3d at
17 1374-75 (general allegation that with passage of time the ability of witness to
18 recall facts and testify completely might be impaired found insufficient to support
19 perpetuation of testimony under Rule 27); Doolin v. Davis, 2017 WL 220131, *4
20 (E.D. Cal. Jan. 19, 2017) (asserted risk of loss of testimony due to deponent's age
21 and possibility that memory may fade over time insufficient under Rule 27).

22 Finally, petitioner has not filed any proofs of service reflecting that he has
23 served "each expected adverse party" pursuant to Rule 4 as required by Rule 27.
24 See Fed. R. Civ. P. 27(a)(2). Nor has petitioner demonstrated that service under
25 Rule 4 could not be made with reasonable diligence on an expected adverse party.
26 The Haysbert Declaration – which is attached to the Ex Parte Application – attests
27 that the "Petition has been served on all prospective Defendants" but does not
28 specify that service was made as required by Rule 4. (Haysbert Declaration ¶ 2).

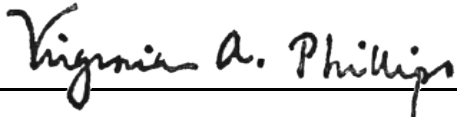
1 Indeed, the Haysbert Declaration appears to elaborate on the foregoing statement
2 by summarizing telephonic communications affording oral notice of the
3 Petition/Ex Parte Application to various individuals and notes the agreement of
4 various individuals to accept service of the same. (Haysbert Declaration ¶¶ 6-11).
5 The foregoing suggests that no adverse party has properly been served with the
6 Petition pursuant to Rule 4 as required.

7 **IV. ORDERS**

8 In light of the foregoing, the Petition is denied, the Ex Parte Application is
9 denied as moot, and this action is dismissed without prejudice. Petitioner is
10 directed to serve a copy of this Order on any Proposed Deponent who was notified
11 of the Petition/Ex Parte Application.

12 IT IS SO ORDERED.

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14 DATED: November 2, 2018

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17 _____
18 HONORABLE VIRGINIA A. PHILLIPS
19 CHIEF UNITED STATES DISTRICT JUDGE

20 Presented by:

21 _____/s/
22 Honorable Jacqueline Chooljian
23 United States Magistrate Judge
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